

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>NICO PHILLIPS</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 819568</b>
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1999.	:	

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Petitioner, Nico Phillips, 2830 N. Calvert Street, Apt. #2, Baltimore, Maryland 21218-4409, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1999.

On July 7, 2004 and July 19, 2004, respectively, petitioner and the Division of Taxation by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), waived a small claims hearing and agreed to submit this matter for determination based upon documents and briefs. The final brief in this matter was due by November 12, 2004, and it is this date that triggers the statutory three-month period for issuance of this determination. After due consideration of the evidence and arguments submitted, James Hoefer, Presiding Officer, renders the following determination.

***ISSUE***

Whether petitioner has adduced sufficient evidence to establish the date that he changed his domicile from New York to Pennsylvania and that a \$13,441.00 net short-term capital gain was received after his change of domicile to Pennsylvania and is therefore not required to be

included in New York adjusted gross income on his New York State Nonresident and Part-Year Resident Income Tax Return for 1999.

***FINDINGS OF FACT***

1. Petitioner herein, Nico Phillips, filed with the Division of Taxation (“Division”) a timely New York State and City Nonresident and Part-Year Resident Income Tax Return for the 1999 tax year. On said return, petitioner indicated that he was taxable as a resident of the State and City of New York from January 1, 1999 until June 30, 1999, the date he purportedly moved out of New York State, and that he was taxable as a nonresident of New York for the balance of the year.

2. Petitioner’s 1999 return reported New York adjusted gross income, computed as a full-year resident, of \$22,760.00 and, of this amount, \$4,809.00 was reported as taxable to New York since it was earned during the period he was a resident of the State and City of New York. Petitioner’s return claimed that no income was earned from New York sources during the nonresident period. The following table details the items of income reported on petitioner’s 1999 return:

<b>ITEM OF INCOME</b>	<b>FEDERAL</b>	<b>RES PERIOD</b>	<b>N/R PERIOD</b>
Interest income	\$5,955.00	\$4,809.00	-0-
Dividend income	3,364.00	-0-	-0-
Capital gain income	13,441.00	-0-	-0-
Taxable social security	296.00	296.00	-0-
Total	23,056.00	5,105.00	-0-
Less: taxable social security	296.00	296.00	-0-
New York adjusted gross income	\$22,760.00	\$4,809.00	-0-

3. Upon review of petitioner's 1999 return, the Division requested that he provide documentation to establish (a) the date he changed his residence from New York City to Pennsylvania and (b) the date of sale that produced the \$13,441.00 capital gain. The record herein does not disclose if petitioner responded to the Division's request for additional documentation and, if he did, what documentation was provided.<sup>1</sup> On November 4, 2002, the Division issued a Statement of Proposed Audit Changes ("Statement") to petitioner asserting that \$386.19 of additional New York State<sup>2</sup> personal income tax was due for 1999, together with interest. The Statement contained the following explanation:

The following adjustment(s) has been made to your New York Nonresident and Part-Year Resident income tax return, Form IT-203.

Since you filed Form IT-203, New York Nonresident and Part-Year Resident Income Tax Return for 1999, and moved out of New York, the following rule applies. The total of all income you received while you were a resident and all income received from New York sources during your nonresident period must be entered in the New York column of your return.

Capital gains incurred during your period of residency are taxable to New York and should be reported on line 7, in the New York column, of your 1999 Form IT-203, Nonresident and Part-Year Resident income tax return.

4. In the Statement, the Division computed the additional tax due of \$386.19 on the basis that petitioner was a part-year resident of New York. The only change proposed by the Division was to include the \$13,441.00 capital gain in New York income on the premise that it was earned during the period that petitioner was a resident of New York.

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<sup>1</sup> It appears that petitioner may not have received the Division's request for documentation as he states in his reply brief that "I did not even receive this original request, which must have been sent first to my former New York address. . . ."

<sup>2</sup> It would appear that additional New York City personal income tax would also be due based on the adjustment made by the Division in its Statement of Proposed Audit Changes; however, the Division has made no claim that additional New York City personal income tax is due for the 1999 tax year.

5. On December 30, 2002, the Division issued a Notice of Deficiency to petitioner for 1999 asserting that \$386.19 of New York State personal income tax was due together with interest of \$78.12. Petitioner protested the Notice of Deficiency by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). BCMS, pursuant to a Conciliation Order Dismissing Request, denied petitioner's request for a conciliation conference since the request, mailed on June 30, 2003, was not filed within 90 days of the December 30, 2002 Notice of Deficiency as required by statute. By letter dated June 23, 2004, the Division conceded the timeliness issue and therefore the matter proceeded on the merits.

6. In June 1999 petitioner graduated from high school, and shortly after his graduation petitioner and his father moved from their apartment at 230 W. 107<sup>th</sup> Street, New York, New York to 4702 Springfield Avenue, Philadelphia, Pennsylvania. The New York City apartment was sublet for a period of one year and at the end of the sublet period the rental rights were relinquished to the individuals subletting the apartment. The house located at 4702 Springfield Avenue, Philadelphia, Pennsylvania was owned by petitioner's father's spouse, and petitioner apparently resided there until his father and his spouse divorced. Petitioner relocated to his current address in Baltimore, Maryland more than two years ago.

7. To support that the capital gain was received in his nonresident period, petitioner submitted a copy of his 1999 Federal Schedule D, Capital Gains and Losses. Said schedule reported that on June 23, 1999 petitioner acquired 37,862 shares of TIAA for \$544,000.00 and that all 37,862 shares were sold on August 24, 1999 for \$557,441.00, thus producing a net short-term capital gain of \$13,441.00.

***SUMMARY OF THE PARTIES' POSITIONS***

8. The Division concedes that if the sale of the TIAA shares occurred after petitioner changed his residence from New York to Pennsylvania, then no additional tax is due. In its Answer, the Division admits that petitioner was taxable as a part-year resident for 1999; however, it maintains that petitioner must establish the date his change of residence occurred and also the date of sale of the TIAA shares. The Division argues that petitioner relies upon his own assertions to prove both the date the TIAA shares were sold and the date that he established residence in Pennsylvania and that absent any corroborating third-party documentation petitioner has failed to meet his burden of proof.

9. Petitioner maintains that as a high school graduate in June 1999 his only ties to New York were through his living arrangement with his father and that when his father moved to Pennsylvania he also moved with him. Since petitioner's father's spouse already owned a house in Pennsylvania, there are no leases, power bills or telephone bills to show that petitioner established a residence in Pennsylvania. Petitioner argues that the documentary evidence adduced to show that he and his father relinquished their New York City apartment effective June 1999 is the only third-party documentation available to him and should be accepted as adequate proof of his change of domicile to Pennsylvania.

10. With respect to establishing the date the TIAA shares were sold, petitioner, on the Division's recommendation, contacted "TIAA-CREF in Boston to get an official record of the date the assets were sold . . . but they were unresponsive . . . ." Petitioner acknowledges in his

brief that he is forced “to maintain this aspect of my case only on the basis of the date as entered on my tax return supplement, which is admittedly unfortunate, but necessary.”

### ***CONCLUSIONS OF LAW***

A. Tax Law § 689(e) places the burden of proof on petitioner, and he must show by clear and convincing evidence that the deficiency issued by the Division is erroneous (***Matter of Suburban Restoration Co., Inc. v. Tax Appeals Tribunal***, 299 AD2d 751, 750 NYS2d 359).

B. In the instant matter, petitioner has failed to meet his burden of proof to show that the deficiency is erroneous. Initially, while the evidence adduced to establish the date petitioner changed his domicile is minimal, I am satisfied and hereby conclude that petitioner has shown that he changed his New York domicile to Pennsylvania in June 1999. Petitioner, however, has failed to present ample evidence to establish that the \$13,441.00 net short-term capital gain was received after he changed his domicile to Pennsylvania. While the self-prepared handwritten copy of petitioner’s 1999 Federal Schedule D, Capital Gains and Losses, shows that the TIAA shares were sold on August 24, 1999, this document, standing alone, is insufficient from an audit standpoint to prove that the sale occurred on this date. It would seem that documents regarding the purchase and subsequent sale of over one-half million dollars in TIAA shares would have been retained by petitioner and produced on audit when requested. Furthermore, if these documents were not retained by petitioner, it would seem to be an easy task to obtain duplicate copies of the brokerage statement or some other form of third-party documentation to verify that the sale occurred on August 24, 1999 as alleged. Notwithstanding the Division’s clear request for the brokerage statement or other documents detailing the date the TIAA shares were sold, no such documents were ever produced by petitioner. Accordingly, it must be concluded that

petitioner has failed to sustain his burden of proof to show that the TIAA shares were sold after he changed his residence from New York to Pennsylvania in June 1999.

C. The petition of Nico Phillips is denied and the Division's Notice of Deficiency dated December 30, 2002 is hereby sustained.

DATED: Troy, New York  
January 27, 2005

/s/ James Hoefer  
PRESIDING OFFICER